U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue date: 27Jun2002

CASE NO.: 2001-LHC-01007

OWCP NO.: 1-136425

IN THE MATTER OF:

PETER A. PINKHOVER
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

APPEARANCES:

Stephen C. Embry, Esquire
For the Claimant

Edward W. Murphy, Esquire
For the Employer/Self-Insurer

Merle D. Hyman, Esquire
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, et seq.), herein referred to as the "Act." The hearing was held on February 20, 2002 in New London, Connecticut, at which time the parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date

CX 9	Attorney Embry's letter filing his	03/15/02
CX 10	Fee Petition	03/15/02
RX 11	Employer's comments thereon	03/15/02
RX 12	Attorney Murphy's brief on behalf of the Employer	04/17/02

The record was closed on April 17, 2002 as not further documents were filed.

STIPULATIONS AND ISSUES

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On April 1, 1996 Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on December 20, 2000.

7. The applicable average weekly wage is $988.54.

8. The Employer has paid no benefits herein.

The unresolved issues in this proceeding are:

1. The nature and extend of Claimant's disability.
2. Claimant's entitlement to compensation and medical benefits.
3. The applicability of Section 8(f) of the Act.

SUMMARY OF THE EVIDENCE

Peter A. Pinkhover ("Claimant" herein), sixty-four (64) years of age and with an employment history of manual labor, began working in September of 1959 as a pipe lagger at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the employer builds, repairs and overhauls submarines. In the performance of his duties as a pipe lagger Claimant was heavily exposed to and inhaled asbestos dust and fibers. In December of 1961 Claimant transferred to the Paint Department as a painter/cleaner and for the next five-to-six years he continued to be exposed to asbestos as his duties included, **inter alia**, cleaning up asbestos debris throughout the boats. In 1972 Claimant became a supervisor in the Paint Department and he continued to be exposed to asbestos dust and fibers, as well as other injurious pulmonary stimuli, such as all forms of paint, paint fumes, chemicals, solvents, etc. (Tr 15-17)

Claimant's medical history is well documented in his medical records but I would note at this point that his breathing problems began as early as 1990 when his May 2, 1990 chest x-ray showed "pleural thickening with calcified pleural plaques. (RX 3) I also note that his May 21, 1990 pulmonary function test showed "mild restrictive pulmonary disease." (RX 4) Claimant continued working and to be exposed to the injurious pulmonary stimuli on a daily basis as he continued to work in close proximity to the trades performing their assigned maritime tasks. He took a voluntary retirement on April 1, 1996. (TR 17-22)

Claimant's current medical condition is best summarized by the October 18, 2000 report of Dr. John A. Pella, a pulmonary specialist, wherein the doctor states as follows (CX 1):

"Mr. Pinkhover was referred to my office by his attorney for evaluation regarding his pulmonary status. He is a 62—year—old male with a clinical complaint of shortness of breath with exertion. His dyspnea has been slowly progressive over the past several years. He also notes a "clicking" sensation in his chest associated with deep breathing which has persisted for over three years. In 1990, he had a medical evaluation prior to hernia surgery and was informed by his physician that his chest X-ray was "abnormal." He was referred for a CT scan of the chest and for pulmonary function testing and was referred to Dr. Albert Laurenzo of Westerly, R.I. Mr. Pinkhover was told he had "asbestos-related"

changes. He had no follow-up evaluations. In 1994 and 1997 he had episodes of "walking pneumonia" which were treated with antibiotics by his attending physician, Dr. Dotolo. He does not recall having a chest X—ray on those occasions. He does recall that chest X-rays were performed as part of surveillance testing at the Electric Boat facility. He is not aware of those results.

"His current complaint is that of dyspnea on exertion (i.e. climbing two flights of stairs) associated with a chronic cough, but no hemoptysis or chest pain. He also describes a "clicking" sensation in his chest. He has a medical history of gastritis/esophagitis treated with an occasional Pepcid AC. He is a former cigarette smoker of less than a pack—per—day from age 18 until quitting 25—years ago.

"He was in the US Army for several years (and) then worked for a chemical company for two years. He then denies any specific exposures during those intervals. He began employment at The Electric Boat facility in Groton, CT in 1959. Initially and intermittently, he worked as a "lagger" but subsequently became a full time employee as a "painter," a position he held until 1996 when he retired. He wore no mask protection at any time. He describes extensive exposure to asbestos particularly dust during the early years of his employment...

"Review of provided past medical records indicates roentgenographic changes on chest X-rays in 1995 that are consistent with mild pleural—pulmonary fibrotic changes. He had pulmonary function testing in 1990 which demonstrated a mild restrictive ventilatory defect with a low—normal diffusion capacity. A chest X—ray was obtained at his current evaluation and reveals bilateral pleural thickening and pleural plaquing. It was unclear to me if there was an underlying increased interstitial markings pattern. No prior films were available for direct comparison. Pulmonary function testing at evaluation demonstrated a mild to moderate restrictive ventilatory defect with reduction of the diffusion capacity. There was no improvement in flow rates after inhaled bronchodilator administration.

"To further clarify chest X—ray changes, a non—contrast chest CT scan with high resolution technique was performed at the Westerly Hospital on 9/22/00. This study confirms extensive pleural plaquing with noted calcifications. This study did not demonstrate appreciable interstitial lung disease.

"In summary, Mr. Pinkhover has a clinical complaint of dyspnea on exertion. His physical examination reveals a friction rub consistent with chronic pleurisy. Plain chest X—ray demonstrates

pleural abnormalities which are confirmed by CT scan of the chest and show pleural plaquing and calcification in a pattern highly consistent with asbestos dust exposure resulting from his occupational exposures. His pulmonary function testing reveals restrictive ventilatory defect without evidence of significant airway obstruction. Mr. Pinkhover demonstrates occupationally—related asbestos lung disease with pleural plaquing and fibrosis. I would assign him to a Class III, i.e. moderate impairment, per **AMA Guidelines to Permanent Impairment**, approximately 40% of the whole man on a respiratory basis and entirely attributed to his occupational exposures," according to the doctor.

The record also contains the December 14, 2000 report of Dr. Milo Pulde, a pulmonary specialist, wherein the doctor states as follows (RX 2):

"Mr. Pinkhover was seen and examined in our offices on December 14, 2000. He entered the examination room at 10:45 and exited at 11:30. He was advised concerning the purpose of today's examination. He was a good historian. Documents available for review consisted of a chest CT from September 22, 2000, a chest x-ray from September 18, 2000, pulmonary function tests from September 19, 2000, and a report by Dr. Pella from October 18, 2000. The chest x-ray from September 18, 2000 with a chest CT from September 22, 2000 were reviewed directly.

REPORTED HISTORY

"Mr. Pinkhover is a 63-year-old male who worked for Electric Boat of Rhode Island from 1959 to 1996, at which time he retired. He states that from 1959 to 1961, he was employed as a laggard, working the third shift from 11:30 to 7:00 a.m. five to seven days per week. He states that he would cut and size asbestos blocks using a band saw and a handsaw as well as apply asbestos pipe covering. He would occasionally apply wet asbestos cement. He states that he worked principally in the ship reactor and did not use respiratory protection.

From 1961 to 1996, he was employed as a painter for the first shift, working from 7:00 a.m. to 4:00 p.m. He painted the interior portion of the ship for approximately 70 percent of the time and the exterior 30 percent. He states that he used "all types" of paints, including epoxy and chromates, but he could not detail the specific types of paints. He would use a spray gun and brush. Again, he states there was no respiratory protection.

"In 1990, Mr. Pinkhover underwent a left inguinal hernia

repair. At that juncture, he was seen by Dr. Marano, a surgeon, who elicited the history of "heartburn." A barium enema was negative. An upper GI revealed a hiatal hernia. Upon review of the upper GI, it appeared that pleural plaques were noted, and he was advised to be seen by Dr. Laurenzo. In 1990, he underwent an evaluation by Dr. Laurenzo who suggested that he "submit a claim." Based on the absence of symptoms, he deferred this submission.

"In 1995, at the urging of friends and after reading a newspaper article indicating that he would no longer be eligible, he filed such a claim. He states that he was not seen for any type of evaluation until the September 18, 2000 pulmonary function test and chest x-ray.

"Since his retirement, he has noted his inability to "run short distances" and felt "knocked out". He states that he can walk up one to two flights of stairs, but he has to "take his time." He can walk on level ground without difficulty. He states that he notes wheezing or clicking in his chest at night but no clear-cut shortness of breath. He uses three pillows for pyrosis which has, secondary to his gastroesophageal reflex as well as post nasal drip, secondary to chronic nasal congestion. He can sleep flat without pillows, but he notes the "dripping" from the back of his nose. There is a history of what appeared to be seasonal allergic rhinitis and gustatory rhinitis in which his nose could "run 12 times with certain foods." There is no history of asthma, nasal polyposis, nasal surgery, or family history of allergic disease. He has had pet dogs his whole life. His home is heated by steam heat. There are bare floors. He has never been on nasal corticosteroids.

"There is a long-standing history of gastroesophageal reflux disease with EGD in 1997 revealing helicobacter pylori, treated with triple antibiotic therapy. He notes symptoms up to seven times weekly always associated with specific foods. He particularly notes worsening with donuts and lying down within two hours of a large meal. He takes Pepcid on occasion. He has noted recently some obstructive symptoms with sticking of food, particularly if he eats fast. His risk for peptic disease include two coffees, occasional tea, occasional tonic, and rare alcohol. He denies nausea, vomiting or hematochezia. He predominately notes nocturnal symptoms...

"A chest x-ray from September 18, 2000 revealed an ectatic aorta, enlarged left ventricle, mild interstitial prominence, and bilateral pleural thickening.

"A chest CT from September 22, 2000 revealed extensive pleural plaquing with calcification, consistent with asbestos exposure. There was "no evidence for interstitial lung disease or pulmonary mass."

"On October 18, 2000, Mr. Pinkhover was seen by Dr. John Pella. In his history, there was a reference to two pneumonias in 1994 and 1997. In addition, there was reference to his tobacco consumption consisting of "less than a pack per day from age 18 until quitting 25 years ago. His occupational history was noted. His examination was remarkable for "rare crackles." X-rays were reviewed. A diagnosis of "occupational-related asbestos lung disease with pleural plaquing fibrosis" was made. His impairment was considered a Class III, based on the **AMA Guides to the Evaluation of Permanent Impairment**.

"Mr. Pinkhover confirmed the above history, including the pneumonias in 1994 and 1997. He states that he consumed tobacco, consisting of less than one pack per day from 1954 until 1971. Consistent with an 18 pack year history.

"Again, he states his cough is often nocturnal but occasionally during the day, often associated with reflux symptoms of post nasal drip. He has never been on bronchodilators, aerosolized or oral corticosteroids. He has not been admitted for hospitalizations except for the 1994 and 1997 pneumonias.

"His GERD symptoms are never exertional. His cardiac risk factors include male gender and a history of tobacco.

PAST MEDICAL HISTORY

"Medications: Pepcid, p.r.n.

Allergies: None.

Tobacco: 18 pack years, as above.

Alcohol: Rare.

"Social History: Married with two children. He states that he is very sedentary and takes care of his grandchild. He walks occasionally but has no defined exercise program...

DIAGNOSIS

"Assessment:

1. Asbestos exposure with diffuse asbestos pleural thickening and pleural plaques with mild restrictive lung disease by pulmonary function tests on September 18, 2000 and extensive plaques by chest x-ray on September 18, 2000 and chest CT on

September 22, 2000, but no evidence of parenchymal asbestosis.

2. Chronic cough; probable multifactorial, including perennial non-allergic rhinitis gustatory rhinitis and reflex laryngitis without evidence of occupational asthma or work aggravated asthma.

3. History of tobacco abuse.

4. Gastroesophageal reflux disease with history of probable H-pylori related antral gastritis by EGD in 1997 with a question of esophagitis/stricture.

5. Idiopathic snoring without evidence of obstructive sleep apnea.

6. Status post inguinal hernia repairs, left 1990 and right 1998.

7. Community acquired pneumonia in 1994 and 1997.

CONCLUSIONS

"Discussion: There is clinical and objective evidence which supports the diagnosis of mild to moderate asbestos exposure, principally occurring from 1959 to 1961, while employed as laggar, resulting in diffuse pleural thickening and pleural plaques, secondary to asbestos, confirmed by acute chest x-rays on September 18, 2000 and a chest CT on September 22, 2000, with a mild restrictive lung disorder as a consequence of extensive plaquing by pulmonary function tests on September 18, 2000, but no evidence of parenchymal asbestosis by any of the above modalities. The evidence also supports a diagnosis of minimal disability as a consequence of the pleural disease with a nocturnal and occasional daily cough, mostly likely multifactorial including reflux laryngitis to gastroesophageal reflux disease and probable non-allergic gustatory rhinitis. The evidence also supports a diagnosis of community acquired pneumonia in 1994 and 1997 resolving with antibiotics, tobacco abuse, consisting of 18 pack years, history of left and right inguinal hernia repairs. Perennial non-allergic and gustatory rhinitis. Antral gastritis with question of esophagitis/esophageal stricture. There was no evidence to suggest Mr. Pinkhover's occupation or exposure at work caused or contributed to his chronic cough, pneumonias, or resulted in either work aggravated or occupational asthma. Mr. Pinkhover's pleural disease was a consequence of his asbestos exposure.

"The salient features of Mr. Pinkhover's history include an asymptomatic state with a submission of claim in 1995, only as a

consequence of concerns regarding eligibility and urging by coworkers, with ongoing symptoms of a cough, consistent with the gastroesophageal reflux disease, with reflux laryngitis and chronic rhinal sinusitis, secondary to non-allergic/gustatory rhinitis, confirmed by chest CT on September 22, 2000 with pulmonary function tests indicating a restrictive lung disease with decreased TLC but preserved diffusing capacity and chest CT from September 22, 2000 not demonstrating parenchymal asbestosis, pulmonary function tests not revealing evidence of asthma, including work-aggravated or occupational asthma, ongoing symptoms of gastroesophageal reflux disease, with questionable esophageal stricture/esophageal motility disturbance, history of tobacco abuse, nasal symptoms of rhinitis consistent with non-allergic, non-asbestos-related disease.

"Mr. Pinkhover's diagnosis is consistent with asbestos-related pleural thickening and pleural plaques.

"Pleural disease is one of the most common manifestations of asbestos exposure. Pleural plaques may be found in individuals without asbestos exposure and are considered non-specific responses to any inflammatory condition. When attributable to asbestos, they are often bilateral and serve as a marker for exposure to asbestos but are not considered an asbestos related disorder. This is based on the fact that asbestos plaques are exterior to the parietal pleura (extra pleura). As a consequence, according to the American Thoracic Society, (American Review of Respiratory Disease 1986) there is no evidence to suggest that these plaques either carry an increased risk for neoplasm or for the development of "functionally significant asbestosis."

"These plaques are usually discreet, limited, and not functional. There is often dystrophic calcification, and they do not transform into mesothelioma.

"As discussed, pleural plaques usually do not effect (sic)a function. However, when they are extensive and associated with diffuse pleural thickening, pleural disease can occasionally trap the lung and result in a restrictive lung pulmonary deficit. This results in a decreased FVC but no change in the diffusing capacity. Other manifestations of asbestos pleural disease include benign pleurisy and rounded atelectasis. There was no evidence of either of these entities. The latency for development for asbestos pleural plaques is approximately 30 years, with a range of three to 57 years.

"As discussed, the chest CT x-ray of September 18, 2000 was consistent with pleural plaques confirmed by chest CT on September 22, 2000 and pulmonary function tests on September 18, 2000

revealed decreased FVC but no change in the diffusing capacity. Consequently, based on Mr. Pinkhover's exposure history, chest x-rays, and pulmonary function tests, his diagnosis is consistent with asbestos pleural plaques and diffuse pleural thickening with mild restrictive disease with preserved diffusing capacity. There is no evidence to suggest tobacco was responsible for his pleural plaques.

"There is no evidence to suggest parenchymal asbestosis. Asbestos represents a family of natural occurring fibrous silicate materials which are found in rock formations and which, because of their thermal resistance and insulating properties, have had widespread use in the construction, ship building, railroad, automobile, and electrical industries. Consequently, asbestos exposure is ubiquitous, and asbestos can be found naturally in the water supply and outdoor air.

"Asbestos can be inhaled and remain in the lungs indefinitely. As a consequence of asbestos exposure, individuals can develop a variety of manifestations, including asbestos-related pleural plaques which, again are considered a marker for asbestos exposure cases, parenchymal asbestosis in which there is fibrosis of the lungs, and asbestos-related malignancies such as mesothelioma.

"As discussed, there is no evidence to suggest parenchymal asbestosis. A diagnosis of asbestos is based on the following:

1. Clinical history which indicated significant exposure with appropriate latency.

2. Chest x-ray findings consistent with the ILO Classification of Radiographs.

3. Pulmonary function tests revealing restrictive lung disease with not only a decrease in lung volumes but also a decrease in diffusion capacity.

4. High resolution CT scans revealing interstitial lung disease.

5. The exclusion of non-asbestos-related disorders which may mimic diffuse interstitial lung disease.

"A review of Mr. Pinkhover's history and documents indicates moderate exposure. His chest x-rays reveal pleural thickening and a questionable increase in interstitial markings, but this was not confirmed by chest CT on September 22, 2000, which is considered a more sensitive and specific determinate for parenchymal involvement. There was no evidence of central or lobular septal thickening, inter lobular septal thickening, curvilinear or

subpleural lines, parenchymal bands, and honeycombing or ground glass appearance to suggest asbestosis. Finally, his pulmonary function tests revealed restrictive lung disease but no decrease in diffusing capacity, which militates against an interstitial lung disease. Consequently there is no evidence of parenchymal asbestosis by criteria.

"Mr. Pinkhover's cough would be considered unrelated to his asbestos exposure or asbestos pleural thickening of plaques. By history and clinically, his cough is multifactorial, including reflux laryngitis secondary to gastroesophageal reflux disease and chronic rhinosinusitis most likely non-allergic and gustatory. There is no evidence to suggest asbestos exposure or the pleural plaques were contributory to the symptomatology.

"Based on the rating scans of the **AMA Guides to Permanent Impairment** and ATS ratings, Mr. Pinkhover would be considered a Class III, or moderate impairment based on a single set of pulmonary function tests on September 18, 2000 in which his FEV1 was 55 percent of predicted. Again, however, his symptoms relate principally to his cough.

"In conclusion, the evidence supports the diagnosis of mild to moderate asbestos exposure with asbestos pleural plaques and pleural thickening with restrictive disease, secondary to same, but no evidence of asbestosis or asbestos-related parenchymal disease/neoplastic disease or work aggravated/occupational asthma. Mr. Pinkhover's principal symptoms relate to his cough which would be considered unrelated to asbestos exposure or his pleural disease. His cough is a consequence of gastroesophageal reflux disease and rhinosinusitis. Finally, the evidence supports a history of non-asbestos-related pneumonias, tobacco abuse, hernia repair, idiopathic snoring, H-pylori, gastritis, GERD, and seasonal allergic rhinitis," according to the doctor.

The record also contains the August 27, 2001 supplemental report of Dr. Pulde wherein the doctor concludes as follows (RX 1):

"I am writing this in response to your inquiry as to the relative contribution of non-asbestos-related factors to Mr. Pinkhover's pleural asbestos and his overall disability. After a review of additional documents and re-review of my previous report of December 14, 2000, it can be stated to a reasonable degree of medical certainty that:

1. Although Mr. Pinkhover's principal diagnosis consisted of asbestos exposure with diffuse asbestos pleural thickening and pleural plaques with mild restrictive lung disease by pulmonary function tests secondary to asbestos-related pleural thickening, there were other disorders which contributed to

Mr. Pinkhover's complaints, to the development of his asbestos-related lung disorder, and disability.

2. On December 14, 2000, Mr. Pinkhover's principal complaints related to his chronic chest pain, dysphagia, and cough secondary to his gastroesophageal reflux disease with tertiary contractions, hiatal hernia, and gastroesophageal reflux disease by upper Gl on October 5, 1995 and erosive gastritis by EGD on November 6, 1996 which was non-asbestos-related.

3. Gastroesophageal reflux disease not only can result in cough but also a variety of pulmonary disorders including asthma (Harding, F. The role of gastroesophageal disease in chronic cough and asthma as well as aspiration syndromes. Chest, 1997: 111; 1389-1402).

4. Mr. Pinkhover's chronic cough, his major complaint, also related to perennial rhinitis and gustatory rhinitis, both non-asbestos disorders.

5. Mr. Pinkhover had a history of tobacco consumption consisting of one pack per day for approximately seven years. It is well established that tobacco consumption accelerates the normal age-related decline in FEV 1 with an additional 20-cc/year decrease in FEV I over a non-smokers (Hurd, S. The impact of COPD on lung health. Chest, 2000; 117:1-4). Therefore, Mr. Pinkhover's tobacco use would result in a compromised baseline lung status upon which was superimposed the restrictive impairment due to his pleural disease. The resulting lung function would, consequently, be substantially greater as a result of the combined effects of both disorders than would have resulted from the effects of pleural disease alone.

6. Tobacco is one of several factors that can increase an individual's susceptibility to the respiratory consequences of asbestos exposure. Tobacco use would accentuate or intensify factors that would reduce the clearance of fibers, increase the retention of fibers, and result in secondary indirect influences on the injury factors (macrophages, cytokines, etc) which are part of the pathogenesis of asbestosis or other asbestos-related disorders.

7. Recurrent pneumonias in 1994 and 1997 would result in an additional compromise of Mr. Pinkhover's baseline or overall respiratory status and result in a degree of combined impairment that would be greater than that as a consequence of his pleural disease alone.

8. Mr. Pinkhover's gastrointestinal evaluation was more extensive and of a greater magnitude then his pulmonary evaluation (including a barium enema, upper gastrointestinal series, and esophagoscopy) suggesting a greater concern by his treating physicians that non asbestos related gastrointestinal disorders were more significant contributors to his ongoing symptomatology and disability.

"Consequently, the aggregate body burden of Mr. Pinkhover's non-asbestos-related disorders and his tobacco abuse resulted in an impairment which was materially and substantially greater then it would have been had he been exposed to asbestos alone without tobacco consumption, rhinitis, recurrent pneumonia, or severe gastroesophageal reflux disease with a erosive esophagitis and gastritis," according to the doctor.

The record also contains the December 3, 1996 letter from Dr. Mitchell B. Basel, a gastroenterologist, to Dr. Joseph Dotola wherein the doctor states as follows (RX 9):

"Peter Pinkhover is a 59 year old gentleman with a history of chronic heartburn, regurgitation, episodic solid food dysphagia and atypical chest pain. On November 6th, he underwent upper endoscopy with biopsy and was found to have erosive changes of his gastric antrum and distal esophagus and a small direct hiatus hernia. Biopsies showed chronic inflammation and bacteria organisms consistent with helicobacter pylori. At this time, patient is feeling better on a medical regimen including use of Prilosec, 20 mg daily. I have carefully discussed the results of his biopsies with him, and have recommended that he continue Prilosec, continue his modified diet, and begin a two week course of Pepto-Bismol and Biaxin to eradicate the underlying helicobacter pylori infection. If his symptoms of abdominal discomfort, chest pain or regurgitation recur, he will call me for further evaluation," according to the doctor.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers**

Association, Inc., 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shifts the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S. Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestosis, resulted from his exposure to and inhalation of asbestos and other injurious pulmonary stimuli at the Employer's shipyard. The Employer has not introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v.**

Kaiser Shipyards, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

INJURY

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable

diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's daily exposure to and inhalation of asbestos dust and fibers and other injurious pulmonary stimuli in the course of the performance of his maritime duties from September of 1957 through April 1, 1996 have resulted in asbestosis, that the date of injury for his occupational disease is April 1, 1996, that the Employer had timely notice of such work-related injury, that the Employer has refused to accept the compensability of such injury and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

NATURE AND EXTENT OF DISABILITY

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

AVERAGE WEEKLY WAGE

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for

compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part**

sub nom. LaFaille v. Benefits Review Board, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Claimant is a voluntary retiree as he took a voluntary retirement on April 1, 1996 from the Employer in the form of the so-called "Golden Handshake" – a program designed to encourage voluntary retirements in lieu of forced layoffs – - and as his date of injury is April 1, 1996. The parties have stipulated, and the record corroborates such stipulations, that Claimant's pulmonary impairment may reasonably be rated at ten (10%) percent permanent partial impairment from April 1, 1996 through September 18, 2000 and at forty (40%) percent permanent partial impairment from September 19, 2000 to the present and continuing.

Accordingly, Claimant is entitled to an award of benefits for such impairment based upon his average weekly wage of $988.54 and an appropriate **ORDER** will be entered herein.

MEDICAL EXPENSES

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is

well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related.

Romeike v. Kaiser Shipyards, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the employer shall authorize, pay for or reimburse Claimant for the reasonable, necessary and appropriate medical care and treatment in the diagnosis, evaluation and treatment of his asbestosis. Claimant is also entitled to a complete annual physical examination, including chest x-rays and pulmonary function tests, to monitor his asbestosis as he is at an increased risk to develop lung cancer as a result of the synergistic effect of his asbestos exposure and his eighteen pack year cigarette history. All such medical expenses shall commerce on April 1, 1996 and are subject to the provisions of Section 7 of the Act.

INTEREST

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on**

reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

SECTION 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

RESPONSIBLE EMPLOYER

The Employer as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914

F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Claimant was daily exposed to asbestos and other injurious pulmonary stimuli from September of 1959 through April 1, 1996 and the Employer was a self-insurer under the Act at the time Claimant took his voluntary retirement.

SECTION 8(F) OF THE ACT

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.,** 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it."

Dillingham Corp. v. Massey, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has

specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for

asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Ship-building v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As Claimant is a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for his asbestosis (CX 1), only his prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See**, **e.g.**, **MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, **supra**, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom.**, **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21

BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982).

Moreover, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly, decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams**, **supra**, at 85.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA **Guides**. Therefore, where the first medical evidence of record sufficient to establish a permanent impairment of decedent's lungs under the AMA **Guides** was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

In the case **sub judice**, Employer has demonstrated the existence of such pre-existing permanent partial disability and, **a fortiori**, Section 8(f) relief is available for the following reasons.

On the basis of the totality of this closed record, I find and conclude that the Employer is entitled to the limiting provisions of Section 8(f). This record reflects (1) that Claimant worked for Employer from September of 1959 through April 1, 1996, (2) that his maritime duties daily exposed him to asbestos and other injurious pulmonary stimuli, (3) that Claimant's breathing problems are documented as early as May 2, 1990, at which time his chest x-rays showed "pleural thickening with calcified pleural plaques" - - a sign of his prior asbestos exposure and a marker of his restrictive pulmonary disease (RX 3), (4) that his May 19, 1990 pulmonary function tests were read by Dr. Albert J. Laurenzo, a noted pulmonary specialist, as showing "mild restrictive pulmonary disease" (RX 4), (5) that his diagnostic tests on October 6, 1995 led to a diagnosis by Dr. Strickland of gastroesophageal reflux disease (GERD) (RX 6), (6) that Claimant had a cigarette smoking history of at least 18- pack years, (7) that he has suffered from rhinitis for many years, (8) that the Employer retained Claimant as a valued employee until April 1, 1996 even with actual notice of his multiple medical problems, and (9) that Claimant's current permanent impairment is the result of the combination of his pre-existing permanent partial disability (**i.e.**, his above-identified medical problems)and his April 1, 1996 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability according to Dr. Pella (CX 1) and Dr. Pulde. (RX 1, RX 2). **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on April 1, 1996, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

ATTORNEY'S FEE

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on March 15, 2002 (CX 10), concerning services rendered and costs incurred in representing Claimant between January 3, 2001 and February 5, 2002. Attorney Stephen C. Embry seeks a fee of $5,279.35 (including expenses) based on 21.11 hours of attorney time and 5.50 hours of paralegal time at various hourly rates.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained, the hourly rates charged and the itemized services. (RX 11)

In accordance with established practice, I will consider only those services rendered and costs incurred after December 20, 2000, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $5,279.35 (including expenses of $199.60) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer as self-insurer shall pay to Claimant compensation for his ten (10%) percent permanent partial impairment from April 1, 1996 through September 18, 2000, based upon Average Weekly Wage of $988.54, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

2. The Employer shall also pay to Claimant compensation for his forty (40%) permanent partial impairment from September 19, 2000 through the present and continuing, based upon his Average Weekly Wage of $988.54, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

3. The Employer's obligation herein is limited to the payment of 104 weeks of permanent benefits and after the cessation of

payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f), from the Special Fund established in Section 44 of the Act.

4. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall authorize furnish and pay for or reimburse Claimant for such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including a complete annual physical examination, and such benefits shall commence on April 1, 1996, and shall continue even after the time period specified in the third Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Stephen C. Embry, the sum of $5,297.35 (including expenses) as a reasonable fee for representing Claimant herein after between January 3, 2001 and February 5, 2002 before the Office of Administrative Law Judges.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:dmd